STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2014
v	No. 316647 Wayne Circuit Court
CHARLES DESHAWN HAYES, Defendant-Appellant.	LC No. 13-000977-FH

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. Defendant was sentenced to 16 days, time served, for felon in possession of a firearm and carrying a concealed weapon, and five years' imprisonment for felony-firearm. We affirm.

I

On November 28, 2013, at approximately 11:00 p.m., Corporeal Lee Willmuth ("Willmuth") observed a vehicle with tinted windows fail to signal a lane change, and thereafter conducted a traffic stop. Willmuth approached the driver, defendant, who was alone in the car. After obtaining defendant's license, Willmuth walked back toward his patrol vehicle, and as he passed the rear of defendant's vehicle he shined his flashlight in the rear window. The illumination in the rear of defendant's vehicle permitted Willmuth to see a handgun lying in a briefcase on the floor of the car, behind the passenger seat. Willmuth returned to the front driver's side window and asked defendant whether "there was something else he wanted to tell [Willmuth] and if he had a permit." Defendant admitted that he did not have a permit for the weapon. Willmuth arrested defendant and called for assistance. Corporeal Matthew Greb ("Greb") arrived, photographed the vehicle and its contents, and collected the gun as evidence. Defendant informed Willmuth that he had obtained the weapon hours before the traffic stop from

a family member. At trial, the parties stipulated that defendant had been convicted of a "specified felony" in 2001.[1]

II

Defendant first argues that his felony-firearm conviction, which was premised upon his felon in possession of a firearm conviction, violates the double jeopardy clauses of the United States and Michigan constitutions. We disagree. Because defendant did not preserve this issue by raising it below, our review is for plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

"The double jeopardy clauses of the United States and Michigan constitutions protect against . . . multiple punishments for the same offense." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). However, cumulative punishments do not violate double jeopardy protections if the Legislature intends to authorize cumulative punishments. *Id*. at 450-451. In *Calloway, id*. at 452, our Supreme Court considered the precise issue raised here:

> In considering MCL 750.227b in [*People v*]*Mitchell*, [456 Mich 693; 575 NW2d 283 (1998),] we concluded that, with the exception of the four enumerated felonies,[4] it was the Legislature's intent to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute. *Id*. at 698.
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> We follow, as did the Court of Appeals in [*People v*]*Dillard*, [246 Mich App 163; 631 NW2d 755 (2001),] our *Mitchell* opinion in resolving this matter. Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b. Because there is no violation of the double jeopardy clause, the Court of Appeals properly affirmed defendant's convictions.

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[4] MCL 750.223 (unlawful sale of a firearm), MCL 750.227 (carrying a concealed weapon), MCL 750.227a (unlawful possession by licensee), and MCL 750.230 (alteration or removal of identifying marks).

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[1] Under MCL 750.224f, "[a] person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm" unless certain requirements are fulfilled. *People v Dupree*, 486 Mich 693, 704 n 12; 788 NW2d 399 (2010); see also MCL 750.224f(10) (defining specified felony). The parties may stipulate that a defendant has been convicted of a specified felony, particularly to avoid any prejudice the defendant might face if evidence of his or her conviction was presented to the jury. See *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997).

"It is the duty of the Supreme Court to overrule or modify caselaw if and when it becomes obsolete, and the Court of Appeals and the lower courts are bound by the precedent established by the Supreme Court until it takes such action." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007). Our Supreme Court has not overruled *Calloway*. Because *Calloway* clearly rejects defendant's position, defendant's argument is without merit. *Calloway*, 469 Mich at 452.

III

Defendant next argues that trial counsel was ineffective for failing to present a witness, Charmaine Miller ("Miller").[2] We disagree. "A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011) (citations omitted).

Defendant did not preserve this issue for appeal by moving for a new trial or for a *Ginther*[3] hearing in the trial court, or by filing a proper motion to remand with this Court pursuant to MCR 7.211(C)(1). *People v Jordan*, Mich App 659, 667; 739 NW2d 706 (2007); *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). Thus, the issue is unpreserved, and this Court's "review of the relevant facts is limited to mistakes apparent on the record." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Both the United States and Michigan Constitutions provide the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). To adequately prove a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) "that there is a reasonable probability that the outcome of the trial would have been

[2] The issues addressed in Sections III and IV were raised in defendant's Standard 4 Brief on Appeal.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

different but for counsel's performance." *People v Roscoe*, 303 Mich App 633, 643-644; 846 NW2d 402 (2014).

In addition, "[it is important to note that defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

> "To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately." [*Id*., quoting *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).]

Defendant has not established the factual predicate for his claim of ineffective assistance of counsel. Defendant asserts that Miller, his girlfriend, was present at the traffic stop, and witnessed Willmuth conduct an illegal search of defendant's vehicle, which resulted in the discovery of the gun. According to defendant, Miller's testimony would have established that Willmuth only recovered the gun, which was inside a brown bag behind the driver's seat and not in plain view, after arresting defendant, placing him in the police car, and searching defendant's car without consent. Defendant argues that because Miller would have contradicted Willmuth's testimony, and testified to facts that would have led to the exclusion of the gun from evidence as the fruit of an illegal, warrantless search, trial counsel was ineffective for failing to call Miller as a witness.

To support his claim, defendant supplied this Court with Miller's affidavit, in which she attests to these facts. However, because defendant did not seek a new trial or *Ginther* hearing in the trial court, or file a motion to remand in this Court, we are limited to reviewing the existing record, and may not consider Miller's affidavit. *Riley*, 468 Mich at 139. The existing record does not support defendant's factual allegations. Although defendant now asserts that Miller witnessed the traffic stop that led to his arrest, there is no mention of Miller anywhere in the trial transcript. Willmuth testified that defendant was the only person in the vehicle at the time of the traffic stop. Thus, the record contains no evidence that Miller witnessed any of the events at issue. As there is no evidence in the existing record that indicates Miller was a witness to the traffic stop, defendant cannot establish the factual predicate for his claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 6. And as defendant cannot establish that Miller witnessed the traffic stop, he cannot demonstrate that counsel's failure to call her to testify was unsound strategy or caused defendant prejudice, and thus, has not demonstrated that he was denied the effective assistance of counsel. See *Armstrong*, 490 Mich at 289-290.

Even if we were to consider Miller's affidavit despite defendant's improper attempt to expand the record, we would conclude that defendant cannot establish a reasonable probability that the outcome would have been different but for counsel's failure to call Miller to testify. Willmuth testified that he saw the gun in plain view in the back seat as he returned to his police car and then he arrested defendant. Miller could not, and did not, aver what Willmuth saw before the arrest, and in the affidavit, Miller only detailed her observations of the police conduct after Willmuth's plain view observation of the gun and the arrest.

IV

Finally, defendant argues that his due process rights were violated because the trial court judge presiding over his trial had a pecuniary interest in obtaining a conviction, violating the rule stated in *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927). We disagree. Defendant did not preserve this issue by raising it below. See *Metamora Water Serv, Inc*, 276 Mich App at 382 (to be preserved for appeal, the issue must be raised, addressed, and decided in the trial court). Thus, we review the issue for plain error affecting substantial rights. *Meshell*, 265 Mich App at 628.

In *Tumey*, the United States Supreme Court recognized that a defendant's due process rights are violated where a "judge is paid for his service only when he convicts the defendant . . . unless the costs usually imposed are so small that they may be properly ignored as within the maxim '*de minimis non curat lex*.' " *Tumey*, 273 US at 532. However, a year after the *Tumey* decision, the Supreme Court clarified that a defendant's due process rights are not violated where a portion of a fine assessed as the result of a conviction is paid into a general fund, out of which the judge that convicted the defendant receives a fixed salary. *Dugan v Ohio*, 277 US 61; 48 S Ct 439; 72 L Ed 784 (1928). Thus, in *Dugan*, because the judge's compensation was not altered by the judge's decision to convict or acquit, the defendant's due process rights were not violated. *Id*. at 65.

Based on his reading of a variety of statutes, defendant asserts that the trial court judge directly received approximately $168 in fees as a result of defendant's conviction, through the imposition of court costs and mandatory fees.[4] Defendant believes that a portion of the court costs and fees imposed are directly deposited in an individual retirement account, which the judge would then receive upon his or her retirement. Defendant is incorrect. The retirement system for Michigan judges was created by our Legislature in the judges retirement act of 1992, MCL 38.2101 *et seq*. Under this act, some eligible judges receive retirement benefits from a reserve of assets, including court fees. MCL 38.2212; MCL 38.2304; MCL 38.2503(1); cf MCL 38.2651 *et seq*. But the exact amount of the benefits received from the reserve depends upon the judge's final compensation and his or her years of service, and the amount of court fees and costs imposed by an individual judge has no effect on the value of the judge's retirement benefits. MCL 38.2503(2)(a)-(e).[5] Accordingly, defendant's due process rights were not violated by the

[4] Defendant was ordered to pay $68 in mandatory state costs, MCL 769.1j(1)(a), a $130 crime victim's rights assessment, MCL 780.905(1)(a), and $600 in court costs.

[5] Defendant cites three statutory provisions, claiming they provide for the forwarding of court costs and fees paid in a criminal case directly to the trial court judge. None of these statutes provide for the disbursement of costs and fees collected in criminal cases at all, let alone to an individual judge. Defendant first cites MCL 600.880(6). No such statute exists; MCL 600.880 contains only five subsections. Further, MCL 600.880 concerns civil filing fees, not fees charged to criminal defendants. Defendant next cites MCL 600.5756(3). This statute provides for the disbursement of filing fees paid in actions seeking to recover possession of premises.

imposition of fees and costs, none of which increased the trial court's compensation. *Dugan*, 277 US at 65.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood

MCL 600.5756(3). Finally, defendant cites MCL 600.8371. This statute provides for the collection and disbursement of filing fees for civil actions. MCL 600.8371.